Transportation Maintenance Services, L.L.C. ***and*** **Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, AFL–CIO.** Case 14–CA–25682

August 17, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On a charge filed July 30, 1999, by Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, AFL–CIO (the Union), the General Counsel of the National Labor Relations Board issued a complaint on October 27, 1999, against Transportation Maintenance Services, L.L.C. (the Respondent). The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit. The Respondent filed a timely answer to the complaint, admitting in part and denying in part the allegations.

On February 23, 2000, the Respondent, the Union, and the General Counsel filed with the Board a stipulation of facts and motion to transfer this proceeding to the Board. The parties agreed that the charge, the complaint, the answer to the complaint, and the stipulation of facts, together with the exhibits attached to the stipulation of facts, constitute the entire record in this case, and that no oral testimony is necessary or desired. The parties waived a hearing before an administrative law judge, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision, and submitted this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order. On April 6, 2000, the Board approved the stipulation of facts, granted the motion, and transferred this proceeding to the Board. The General Counsel and the Respondent filed briefs.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a limited liability company engaged in the fueling and service of trucks at its Bridgeton, Missouri facility. During the 12-month period ending September 30, 1999, the Respondent, in conducting its business operations, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Missouri, and provided services valued in excess of $50,000 for enterprises, each of which meets other than a solely indirect standard for the assertion of the Board's jurisdiction. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issue presented is whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union following issuance of the Board's June 10, 1999 Order in *Transportation Maintenance Services*, 328 NLRB 691 (1999) (*Transportation Maintenance I*) (Members Hurtgen and Brame jointly dissenting). Previously, on July 21, 1998, the Board issued an order which (1) granted the Petitioner's request to withdraw the decertification petition in Case 14–RD–1568, and (2) expressly closed the decertification case. In *Transportation Maintenance I*, the Board denied the Respondent's motion for reconsideration of the Board's July 21, 1998 Order.

In its answer to the complaint, the Respondent admits (as discussed more fully below) that it voluntarily recognized the Union on December 11, 1996, and further admits that since July 26, 1999, it has failed and refused to recognize and bargain with the Union. But the Respondent denies that the Union is still the designated exclusive bargaining representative of the unit employees or the exclusive bargaining representative under Section 9(a) of the Act. The Respondent, thus, denies that its refusal to recognize and bargain with the Union violated the Act.

A. Stipulated Facts

1. The unit

The following employees of the Respondent constitute a unit (the unit) appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All fuelers and service technicians employed by the Respondent at its Bridgeton, Missouri facility, EXCLUDING mechanics, office clerical, and professional employees, guards, and supervisors, as defined in the Act.

2. Background

The Respondent voluntarily recognized the Union as the majority collective-bargaining representative of the unit on December 11, 1996, pursuant to the terms of a private settlement agreement between the Union and the Respondent in Case 14–CA–32828. The Respondent continued to recognize the Union as the exclusive collective-bargaining representative of the unit from December 11, 1996, until at least April 29, 1997, when a decertification petition was filed in Case 14–RD–1568. The Regional Director issued a Decision and Direction of Election on May 29, 1997. He found, inter alia, (1) that the Respondent's December 11, 1996 recognition of the Union was not a bar to a decertification election, and (2)

that, in any event, a reasonable time for bargaining had elapsed between the Respondent's recognition of the Union and the filing of the decertification petition so as to remove any arguable recognition bar to the election. The Union filed a request for review of the Regional Director's Decision and Direction of Election, and the Board granted the request for review on June 25, 1997. Shortly thereafter, the Regional Director conducted the decertification election and impounded the ballots without opening them. No objections were filed to conduct affecting the results of the election.

On July 15, 1998, while the Regional Director's Decision and Direction of Election was under review by the Board, the decertification Petitioner filed a request with the Board to withdraw his petition. On July 21, 1998, the Board issued an Order granting the request for withdrawal and expressly closing the decertification case. The Respondent filed a motion for reconsideration of that Order, asserting that since the election had already been conducted it would be inequitable to permit one employee, i.e., the Petitioner, to withdraw the petition, thereby depriving the unit employees of their vote.

On June 10, 1999, the Board denied the Respondent's motion for reconsideration.[1] Applying the principles set forth in sections 11116 and 11110.1 of the Board's Casehandling Manual (Part Two), Representation Proceedings the Board majority found that, (1) there was no evidence or claim that the Petitioner's purpose in withdrawing the petition was to circumvent the 1-year election bar of Section 9(c)(3) of the Act,[2] (2) there was no evidence that the Petitioner's desire to discontinue the decertification proceeding was not genuine or voluntary, and (3) there was no evidence or allegation that any unit employee opposed the withdrawal of the petition. The Board majority concluded that its approval of the Petitioner's request to withdraw the petition did not run counter to the purposes and policies of the Act. Rather, in the absence of evidence that the request to withdraw the petition was not voluntary or that other employees opposed the withdrawal, approval of the request actually furthered one of the primary purposes of the Act: to promote stability in collective-bargaining relationships.

Members Hurtgen and Brame jointly dissented. They would have denied the request to withdraw the decertification petition and instead would have opened and counted the impounded ballots and issued an appropriate certification based on the results of the voting.[3] In their view, the secret ballots cast in the privacy of the voting booth in a Board-conducted election most accurately reflected the unit employees' views on representation, which should not have been negated by the subsequent withdrawal of the petition by the Petitioner, an individual employee.[4]

3. Refusal to bargain

On July 23, 1999, the Union requested in writing that the Respondent bargain with it as the exclusive collective-bargaining representative of the unit. The Union's letter stated that it had reviewed *Transportation Maintenance I*, denying the Respondent's motion for reconsideration of the Board's approval of the withdrawal of the decertification petition, and was therefore requesting to meet with the Respondent to negotiate a collective-bargaining agreement.

The Respondent replied to the Union in writing on July 26, 1999, expressly refusing to bargain with the Union. The Respondent's letter stated that it agreed with the dissenting opinion in *Transportation Maintenance I* that once a decertification election has been held, the ballots should be counted and an appropriate certification should be issued.

B. Contentions of the Parties

1. The General Counsel

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union since July 26, 1999. More specifically, the General Counsel notes that in the underlying decertification proceeding the Board granted the Petitioner's request to withdraw the decertification petition and closed the decertification case, and denied the Respondent's motion for reconsideration of that ruling. The General Counsel further notes that the impounded ballots in the decertification election were never opened and counted, at no time has a majority of unit employees indicated that they no longer wish to be represented by the Union, and the Respondent has not challenged the majority status of the Union. Thus, the General Counsel contends that the Respondent has a continuing duty to recognize and bargain with the Union, pursuant to its voluntary recognition, and that it has provided no reason for its failure and refusal to do so, other than its reliance on the dissent's position in *Transportation Maintenance I*, that once a decertification election has been conducted, the ballots should be opened and counted and an appropriate certification issued. Citing, inter alia, *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161–162 (1941), the General Counsel asserts that

[1] *Transportation Maintenance I*, supra.

[2] Sec. 9(c)(3) states in pertinent part that "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held."

[3] In doing so, Members Hurtgen and Brame expressly affirmed the Regional Director's Decision and Direction of Election in the decertification proceeding and found, for the reasons stated by the Regional Director, that the Respondent's recognition of the Union did not constitute a recognition bar to the requested decertification election. They found it unnecessary to pass on the Regional Director's alternative finding that a reasonable period of time for bargaining had elapsed by the time the decertification petition was filed. *Transportation Maintenance I*, supra (dissenting opinion).

[4] Id. Members Hurtgen and Brame also disagreed with the majority's reliance on the principles set forth in the Casehandling Manual, on the grounds that the Manual does not necessarily represent Board law.

the Respondent is not entitled in the instant proceeding to relitigate issues that were or could have been litigated in the prior representation proceeding.

2. The Respondent

The Respondent contends that where, as here, a decertification election has been conducted, and no objections to conduct affecting the results of the election have been filed, the ballots should be opened and counted and the appropriate certification should be issued. The Respondent maintains that the Board's failure to count the ballots in the decertification election "frustrates the purposes of the Act and deprives the employees of the election to which they are entitled under the Act" and "privileges [the Respondent] to fail and refuse to bargain."

The Respondent also contends that it has no duty to bargain with the Union because a reasonable time for bargaining had elapsed prior to the decertification petition being filed. It notes that the Regional Director impounded the ballots in the decertification election without counting them because, at the time of the election, the Union's request for review of the Regional Director's Decision and Direction of Election was pending before the Board. The Board, thus, subsequently granted the Petitioner's request to withdraw the petition and closed the decertification case without having ruled on *the Union's* request for review arguing that the petition should have been barred because a reasonable amount of time for bargaining had not elapsed before the filing of the petition. The Respondent contends that "[b]ecause the withdrawal should not have been allowed given the circumstances of this case, this underlying issue should be resolved so that the results of the election can be certified." The Respondent then argues that the facts establish that a reasonable amount of time for bargaining *had* elapsed before the filing of the instant decertification petition, therefore, the petition would not have been barred on that basis, and "thus, [the Respondent] is under no duty to bargain with Local 618."

3. The Union

The Union asserts, inter alia, that (1) the Respondent is not justified in withdrawing recognition and refusing to bargain with the Union on the basis of issues which were previously fully litigated and determined in a representation proceeding, and (2) the Respondent may not raise the issue of whether or not a reasonable amount of time for bargaining had elapsed before the filing of the instant decertification petition, because that issue is moot as a result of the Board's approval of the Petitioner's request to withdraw the decertification petition in *Transportation Maintenance I.*

C. Analysis and Conclusions

It is well settled, as the General Counsel contends, that in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, supra at 162.[5]

The Respondent's contention that the impounded ballots in the election should be opened and counted, and an appropriate certification issued, was raised in its motion for reconsideration of the Board's order granting the Petitioner's request to withdraw the decertification petition in the underlying representation case, and was rejected by the Board in *Transportation Maintenance I.* The Respondent has offered no newly discovered or previously unavailable evidence nor has it adduced any special circumstances which would require a reexamination of the Board's decision in *Transportation Maintenance I.*

The Respondent also contends that it has no duty to bargain with the Union because a reasonable time for bargaining had elapsed prior to the decertification petition being filed. In agreement with the Union, we find that the issue of whether or not a reasonable amount of time for bargaining had elapsed before the filing of the instant decertification petition is moot, as a result of the Board's approval of the Petitioner's request to withdraw the decertification petition in *Transportation Maintenance I*.[6]

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. Accordingly, we also find that the Union continues to be the exclusive representative of the employees in the above-described appropriate unit under Section 9(a) of the Act. Consequently, we conclude that the Respondent's refusal to bargain with the Union since July 26, 1999, as the statutory bargaining representative of its employees in the above-described appropriate unit is in violation of Section 8(a)(5) and (1) of the Act.[7]

---

[5] The policy considerations which bar such relitigation are not limited in their application to only 8(a)(5) refusal-to-bargain cases that are brought to test the validity of a union's certification as collective-bargaining representative. *Hafaidi Beach Hotel*, 321 NLRB 116 (1996), enfd. mem. 116 F.3d 485 (9th Cir. 1997), cert. denied 522 U.S. 1107 (1998) (no relitigation in subsequent related 8(a)(1) and (3) case of Board's jurisdiction asserted in underlying representation case).

[6] Under Board law, the fact that a reasonable time for bargaining may have elapsed following the employer's grant of recognition does not privilege the employer to withdraw recognition, unless the employer has a good faith doubt or uncertainty based on objective evidence of the union's continuing majority status. See *Allentown Mack Sales & Service v. NLRB,* 522 U.S. 359 (1998). As noted by the General Counsel, the Respondent has not asserted such a good-faith doubt or challenged the Union's majority status.

Member Hurtgen notes that the Respondent's position is based on the proposition that the ballots should have been counted so as to resolve the question of the Union's majority status. Thus, he treats the Respondent as having questioned the Union's majority status.

[7] As noted above, Members Hurtgen and Brame jointly dissented from the Board's Order denying the Respondent's motion for reconsideration of the Board's approval of the Petitioner's request to withdraw the decertification petition in *Transportation Maintenance I*, and they remain of that view. Member Hurtgen, however, agrees that the Re-

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. More specifically, having found that the Respondent has unlawfully refused to bargain with the Union, we shall order the Respondent, on request of the Union, to bargain collectively and in good faith with the Union on terms and conditions of employment of the unit employees, and if an understanding is reached, to embody it in a signed agreement.

The General Counsel has requested that, "to assist in effectuating the Board's backpay orders," the Board include in its Order in this case modified language regarding the Respondent's obligation to provide records for computing backpay. We find it unnecessary in this case to address the merits of the General Counsel's request, because the remedy for the Respondent's unfair labor practice does not include a backpay component. For that reason, the General Counsel's request is denied.

ORDER

The National Labor Relations Board orders that the Respondent, Transportation Maintenance Services, L.L.C., Bridgeton, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of the employees in the following appropriate unit:

> All fuelers and service technicians employed by the Respondent at its Bridgeton, Missouri facility, EXCLUDING mechanics, office clerical, and professional employees, guards, and supervisors, as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the appropriate unit described above concerning terms and conditions of employment, and if an understanding is reached, embody it in a signed agreement.

(b) Within 14 days after service by the Region, post at its Bridgeton, Missouri facility, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 26, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

MEMBER BRAME, dissenting.

In the underlying representation proceeding, I joined in dissenting from my colleagues' denial of the Respondent's motion for reconsideration of the Board's approval of the Petitioner's request to withdraw the decertification petition. I would have granted the motion, rescinded the approval of the withdrawal, ordered that the impounded ballots be opened and counted, and issued an appropriate certification based on the results of the voting. Accordingly, I dissent here from my colleagues' finding that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain with the Union.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection

spondent has not raised any new matters that are properly litigable in this unfair labor practice case. See *Pittsburgh Plate Glass Co. v. NLRB*, supra at 162. In light of that, and for institutional reasons, he agrees with the decision to find that the Respondent has violated Sec. 8(a)(5) and (1) of the Act in this proceeding. Member Brame has filed a dissenting opinion.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with Automotive, Petroleum and Allied Industries Employees Union, Local 618, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining representative of our employees in the following appropriate unit:

All fuelers and service technicians employed by the Respondent at its Bridgeton, Missouri facility, EXCLUDING mechanics, office clerical, and professional employees, guards, and supervisors, as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the appropriate unit described above on terms and conditions of employment, and if an understanding is reached, embody it in a signed agreement.

TRANSPORTATION MAINTENANCE SERVICE, L.L.C.